

defendant has a right to submit the conflicting claims of pursuing creditors.

The defendant debtor in such cases is equally interested in having the jurisdiction of the court correctly determined. If the exact hour and day upon which interlocutory proceedings took place in rival courts were to determine the priority of liens and claims to the credits in the hands of such defendant debtors, frequent collisions in the jurisdiction of courts would occur, and prove extremely embarrassing. So the courts have wisely determined that the prior pendency of a suit involving the same subject-matter is the test of priority in jurisdiction; and when a defendant is lawfully served with process, or otherwise legally made a defendant in such court, he is rightfully first amenable to the orders and judgments of that court, and protected by submitting himself thereto.

This doctrine is fully and clearly announced by the supreme court of the United States in the case of *Wallace v. McConnell*, 12 Pet. 136, and, though other authorities are cited by counsel, this one is sufficient and controlling. The defendants in the suit in the United States circuit court in the case above cited were not, therefore, amenable to the garnishee process under the attachment proceedings in the Ohio court.

The circuit court, upon the pleadings and evidence, found that the several assignments of partial interests in the judgment made by the plaintiff were valid, and that notice thereof had been duly given and filed in that court. Thereupon the order of distribution of the funds paid in by the judgment debtors was made by the court. Counsel, in their briefs, do not contend that there was any error in the order of the court finding the above assignments regular and valid. We understand the contention to relate solely to the priority of the lien upon the fund which the plaintiff, Mack, is claimed to have acquired by the attachment proceedings in the Ohio court, and this has been fully considered. It is not, therefore, necessary to determine the question whether or not the superior court of Cincinnati acquired jurisdiction of A. W. Darling by virtue of the attachment proceedings under which Block & Sons were garnished as having credits due to Darling, and by the subsequent service by publication.

We hold that the jurisdiction of the United States court in Kentucky over the defendants attached long prior to the institution of the suit in Ohio, and that thereby the defendant was first bound to fully answer the orders and judgments of that court, and, having done so, is protected thereby.

The judgment of the circuit court is affirmed.

DE LOY v. TRAVELER'S INS. CO. OF HARTFORD.
(Circuit Court, W. D. Pennsylvania. November 29, 1893.)

No. 7.

REMOVAL—ALLEGATIONS AS TO CITIZENSHIP—AMENDMENT.

A record not showing whether the defendant, entitled by a company name, is a natural or artificial person, and a petition stating that defend-

ant is a citizen of another state, without averring incorporation in that state, do not affirmatively show a right to removal because of such citizenship, and the defect cannot be supplied by amendment.

At Law. Action by Adele De Loy against the Traveler's Insurance Company of Hartford, Conn., brought in the court of common pleas of Lycoming county, Pa., and removed therefrom by defendant. Heard on motion to remand. Granted.

The motion was made on the following grounds:

First. Because the petition filed in the state court for the removal of the case to the circuit court of the United States appears by the record to have been filed after answer made by the defendant to the plaintiff's declaration and statement.

Second. Because the record fails to show that the defendant is a nonresident of the state of Pennsylvania, and was such nonresident at the time suit was brought.

F. P. Cummings and H. C. & S. T. McCormick, for the motion.

C. E. Sprout and J. A. Beeber, opposed.

BUFFINGTON, District Judge. We are of opinion that neither the petition nor record affirmatively discloses such facts as warranted the removal of this case from, or divested the jurisdiction of, the court of common pleas of Lycoming county. The record does not show whether the defendant is a natural or an artificial person; whether a partnership or an individual doing business under a company name. The praecipe for the summons entitles the parties as "Adele De Loy v. The Traveler's Insurance Co. of Hartford, Conn.," and the petition for removal sets forth "that said defendant, your petitioner, at the time this suit was commenced, was, and still is, a citizen of the state of Connecticut." Do these facts affirmatively show a right of removal? It was alleged on the argument that in point of fact the defendant company was a corporation duly created by the laws of Connecticut, but there is no such averment in the record. If it be a corporation, not only should that fact be averred, but the place of incorporation must be specified, as upon that fact depends its place of citizenship. See *Frisbie v. Railway Co.*, 57 Fed. 1, and cases there cited.

But leave is asked to amend. This we decline to allow. It has been held in *Carson v. Dunham*, 121 U. S. 427, 7 Sup. Ct. 1030, that in a case where a petition for removal on its face showed a right to transfer, an amendment germane to the petition, and which did no more than set forth in proper form what was before imperfectly stated, was permissible. But in the present case we have a petition which on its face shows no right to remove, and the proposed amendment would show what is not now shown, viz. the jurisdictional fact of actual parties of such diverse citizenship as would confer jurisdiction on the court. The case comes within the spirit of *Crehore v. Railway Co.*, 131 U. S. 242, 9 Sup. Ct. 692, and *Jackson v. Allen*, 132 U. S. 32, 10 Sup. Ct. 9, and is not the subject for an amendment such as is proposed in the circuit court, when the case was originally brought in the state court, and from thence removed.

The case is therefore remanded to the court of common pleas of Lycoming county, at the costs of the defendant, and it is so ordered.

STREIGHT v. JUNK et al.

(Circuit Court of Appeals, Sixth Circuit. December 9, 1893.)

No. 112.

1. CREDITORS' BILL.—WHO MAY MAINTAIN—CORPORATIONS.

A creditors' bill cannot be maintained by one who has neither obtained a judgment, nor shown any reason for not doing so.

2. CORPORATIONS—RIGHTS OF STOCKHOLDERS.

A stockholder may sue to enforce a claim of the corporation against its managing officer for diversion of funds, when its assignee in insolvency refuses to do so.

3. SAME—LACHES—PLEADING.

A stockholder who seeks to enforce rights of the corporation against its managing officer for diversion of funds arising from an unauthorized "swapping" of checks, and who, after alleging that, being a director, he protested in writing against such acts on first learning thereof, but that they were nevertheless continued for two years, shows facts convicting himself of laches, if he fails to further aver that he was ignorant of such continuance.

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

In Equity. Suit by John Streight, as a creditor and stockholder of the Junk Bros. Lumber & Manufacturing Company, to enforce claims of the corporation against S. C. Junk, its managing officer, arising from his unauthorized acts. Demurrers to the bill were sustained below, and it was then dismissed. Complainant appeals. Affirmed.

Statement by RICKS, District Judge:

The bill of complaint in this case was filed by John Streight, a citizen and resident of the state of Ohio, and suing on his own behalf, and all others interested as stockholders and creditors of the Junk Bros. Lumber & Manufacturing Company, against that company, S. C. Junk, and George W. Stainback, assignee under a general assignment for the benefit of creditors made by said company and S. C. Junk. All of said defendants are citizens of the state of Tennessee and district aforesaid.

The material averments in the bill are that the defendant company is a Tennessee corporation carrying on the business of the sale and manufacture of lumber; that during the year 1890 and other years the defendant S. C. Junk was president, and at times also general manager, of said company, and that as such officer he had charge and control especially of its financial affairs, and a general supervision of its business; that said Junk, as such officer of the company, without the knowledge or consent of or notice to any other stockholder or officer, did execute and issue corporate paper in the form of notes and bills of exchange for the purpose of "swapping" the same for similar paper made by the firm of G. W. & W. H. Bliss, when he knew said firm to be insolvent; that the complainant, being advised of said illegal acts for the first time about August, 1890, and being a stockholder and a director, did address the defendant Junk a protest in writing against such unlawful acts on his part and on behalf of the company, but that, notwithstanding such protest, said Junk continued the unlawful exchange of negotiable paper with Bliss & Co. until the fall of 1890, when said firm failed, and upon said failure, as the paper issued by complainant's company to Bliss, and by Bliss to the former company, matured, the said Junk, as president, paid off the same with the money of said corporation, the amount of the illegal paper so paid aggregating some \$18,000; that because of such losses the complainant's company, after a struggle of some 18 months, viz. in May, 1892, finally succumbed, and made a